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No. 09-1316

In The

Supreme Court of the United States

TRACY BROWN,

Petitioner,

v.

JEFFREY MARK OLSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court established a limited exception to the mootness doctrine for claims brought on behalf of a putative class of similarly situated individuals whereby the case is deemed justiciable notwithstanding the mooting of the named plaintiff's individual claims when (a) "it is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for the district court to certify the class," and (b) "the constant existence of a class of persons suffering the [alleged] deprivation is certain." *Id.* at 111 n.11. This "inherently transitory" exception to traditional Article III standing, which requires a fact-based and case-specific analysis, has been repeatedly reaffirmed by this Court and faithfully applied by the lower courts. The question presented is:

Whether the Seventh Circuit properly applied the "inherently transitory" exception to the mootness doctrine to a putative class action brought on behalf of a named plaintiff seeking declaratory and injunctive relief who was unexpectedly transferred away from Tippecanoe County Jail – and whose individual claims were thereby rendered moot – when (a) the district court held the plaintiff's class motion under advisement for a lengthier period of time than the plaintiff's entire stay in the jail, (b) the period of time that the claims of any individual named as

QUESTION PRESENTED – Continued

plaintiff would remain extant cannot be known at the outset of litigation, (c) nearly fifty percent (50%) of all inmates are incarcerated at the jail for less than three (3) months, (d) each member of the putative class is subject to release at a moment's notice, and (e) it is undisputed that a constant class of persons suffering the alleged deprivations at issue in this case remains in existence.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. The Seventh Circuit faithfully applied this Court's precedents in rendering the fact-specific determination that this case meets the "inherently transitory" exception to the mootness doctrine	4
II. There is no conflict amongst the circuits regarding the application of the "inherently transitory" exception, and the Sheriff's attempt to create one reveals only the common-sense conclusion that the application of this Court's clear and unequivocal test will result in different outcomes when invoked in different factual settings	11
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Arrango v. Ward, 103 F.R.D. 638 (S.D.N.Y. 1984) 5

Bell v. Wolfish, 441 U.S. 520 (1979) 16

Board of Sch. Comm'rs of City of Indianapolis v. Jacobs, 420 U.S. 128 (1975) (*per curiam*) 10

Clay v. Miller, 626 F.2d 345 (4th Cir. 1980) 16

Coleman v. Stanziani, 570 F.Supp. 679 (E.D. Pa. 1983) 5

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 4

Cruz v. Farquharson, 252 F.3d 530 (1st Cir. 2001) 12, 13

Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980) 15, 16

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 10, 11

Dillard v. Pitchess, 399 F.Supp. 1225 (C.D. Cal. 1975) 5

Faheem-El v. Klincar, 600 F.Supp. 1029 (N.D. Ill. 1985) 5

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982) 9

Gerstein v. Pugh, 420 U.S. 103 (1975) ..... *passim*

Green v. Johnson, 513 F.Supp. 965 (D. Mass. 1981) 5

TABLE OF AUTHORITIES – Continued

Page

Holmes v. Fisher, 854 F.2d 229 (7th Cir. 1988).....13

Inmates of Lincoln Intake & Detention Ctr. v. Boosalis, 705 F.2d 1021 (8th Cir. 1983).....14

Jane B. v. New York City Dep't of Soc. Servs., 117 F.R.D. 64 (S.D.N.Y. 1987).....5

Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975).....4

Kazarov v. Achim, No. 02-C-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003).....5

McGill v. Parsons, 532 F.2d 484 (5th Cir. 1976).....4

Marcera v. Chinlund, 565 F.2d 253 (2d Cir. 1977) (*per curiam*).....4

Mudd v. Busse, 68 F.R.D. 522 (N.D. Ind. 1975), *on reconsideration on other grounds*, 437 F.Supp. 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978).....5

Olson v. Brown, 594 F.3d 577 (7th Cir. 2010)....*passim*

Richardson v. Monroe County Sheriff, No. 1:08-CV-0174, 2008 WL 3084766 (S.D. Ind. Aug. 4, 2008).....4

Rocky v. King, 900 F.2d 864 (5th Cir. 1990).....15

Swisher v. Brady, 438 U.S. 204 (1976).....4, 6

Tucker v. City of Montgomery Bd. of Comm'rs, 410 F.Supp. 494 (M.D. Ala. 1976).....5

U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).....10, 13, 16

TABLE OF AUTHORITIES – Continued

Page

Vandehey v. Vallario, No. 06-CV-01405, 2008 WL 697428 (D. Colo. Mar. 13, 2008).....4

Wade v. Kirkland, 118 F.3d 667 (9th Cir. 1997) 13, 14

Weinstein v. Bradford, 423 U.S. 147 (1975).....10

Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977) 4

STATUTES

42 U.S.C. § 1997e(a) 12

OTHER AUTHORITIES

Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996) 7

INTRODUCTION

The petitioner avers repeatedly that the Seventh Circuit misapplied this Court's precedents establishing an "inherently transitory" exception to the mootness doctrine. This is not true, and the petitioner's purported circuit split reflects only the common-sense notion that differing facts viewed under the same legal test may yield different results. Plenary review by this Court is not justified, and the petition should therefore be denied.

STATEMENT OF THE CASE

On January 2, 2009, while still incarcerated in the Tippecanoe County Jail, Jeffrey Mark Olson filed his Class Action Complaint for Declaratory and Injunctive Relief, in which he challenges four (4) alleged practices or policies of the Sheriff as violative of the United States Constitution and Indiana law. The plaintiff's Motion for Class Certification was filed contemporaneously with his complaint.

Thirteen (13) days after the filing of his complaint, and while his class motion remained pending, the plaintiff was transferred away from the jail to the Indiana Department of Correction. The Sheriff thereafter sought dismissal of the plaintiff's claims, arguing that his transfer rendered the case moot. The district court agreed. While the court acknowledged that "when a class action is sought, the mooting of the plaintiff's individual claims for relief does not moot

the case if[] the plaintiff's individual claims are inherently transitory" (App. 23), it nonetheless held that two (2) facts rendered the present case ineligible for this exception: first, the plaintiff filed his last grievance appeal nearly two (2) months before seeking redress in court; and second, slightly more than half of the population of the Tippecanoe County Jail is incarcerated for more than 90 days, and approximately 30% of the inmate population is incarcerated for more than half a year (App. 25).

On appeal, the Seventh Circuit reversed. This Court's precedents, said the court,

> require a claim to meet two main elements for the "inherently transitory" exception to apply: (1) it is uncertain that a claim will remain live for any individual who would be named as plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint.

(App. 8-9). The court noted the relatively brief duration of confinement at the jail and, addressing the first element, concluded that "based on the stipulated facts, it is uncertain that any potential named plaintiff in the class of inmates would have a live claim long enough for the district court to certify the class" (App. 9). Dispensing with the notion that a bright-line rule exists whereby the "inherently transitory" nature of a claim may be gleaned from the number of days a plaintiff's claims were extant, the court drew specific attention to the fact that the duration of Mr.

Olson's claims were "at the discretion of the Indiana Department of Correction." Said the court: "An individual incarcerated in a county jail may be released for a number of reasons he cannot anticipate. . . . This uncertainty is precisely what makes the 'inherently transitory' exception applicable in this case" (App. 10-11). Addressing the second element that must be met for a plaintiff to benefit from the "inherently transitory" exception, the court noted that "[t]he pervasive nature of these claims, as evidenced by the fifty-three affidavits outlining problems similar to those complained of by Olson, make it likely that [the jail's] alleged practices . . . will continue" (App. 13).

REASONS FOR DENYING THE PETITION

The Sheriff advances two (2) primary arguments in support of his petition. First, he argues that the Seventh Circuit impermissibly expanded the "inherently transitory" exception to the mootness doctrine by applying that exception to a case in which the class's claims are only potentially transitory; and second, he insists that the circuit courts have experienced difficulty in applying the unequivocal commands of *Gerstein v. Pugh*, 420 U.S. 103 (1975), and its progeny. However, the former argument is betrayed by the plain language of *Gerstein*, and the latter is erroneous as a factual matter. Nothing in this case warrants this Court's review, and the petition should therefore be denied.

I. The Seventh Circuit faithfully applied this Court's precedents in rendering the fact-specific determination that this case meets the "inherently transitory" exception to the mootness doctrine.

In *Gerstein*, this Court developed the "inherently transitory" exception to the mootness doctrine – which is applied to cases where class membership is characterized by such brevity that a district court cannot reasonably be expected to rule on a class motion before the expiration of any plaintiff's individual claim – in the context of an action brought by a class of county jail inmates. 420 U.S. at 111 n.11. This Court subsequently applied this exception in the context of a policy permitting judicial review of exceptions to masters' proposed findings of nondelinquency, *see Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1976), and in the context of an allegedly impermissible delay in the provision of probable cause hearings, *see County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). With near universality, the lower courts have recognized that the claims of county jail inmates are of such inherently brief duration that prosecuting an action for injunctive relief would become nearly impossible absent the *Gerstein* doctrine.[1] The Seventh

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[1] *See, e.g.*, *Marcera v. Chinlund*, 565 F.2d 253, 255 (2d Cir. 1977) (*per curiam*); *Zurak v. Regan*, 550 F.2d 86, 91-92 (2d Cir. 1977); *McGill v. Parsons*, 532 F.2d 484, 488 & n.5 (5th Cir. 1976); *Jones v. Diamond*, 519 F.2d 1090, 1097-99 (5th Cir. 1975); *Richardson v. Monroe County Sheriff*, No. 1:08-CV-0174, 2008 WL 3084766, at *3 (S.D. Ind. Aug. 4, 2008); *Vandehey v. Vallario*,

(Continued on following page)

Circuit – which had before it both specific facts concerning the average duration of an inmate's incarceration at Tippecanoe County Jail and specific facts concerning the named plaintiff's stay at the jail – thus faithfully and unsurprisingly applied this doctrine to the case at bar.

In arguing that the Seventh Circuit impermissibly expanded the inherently transitory exception of *Gerstein* and its progeny, *see* Pet. 5-7, the Sheriff asserts that that court erred in "focus[ing] on the uncertainty faced by any particular claimant at the outset" of the case rather than "examining generically the duration of the type of class claim asserted by the plaintiff." Pet. 6. Of course, this argument – to the extent that it is anything other than an argument over semantics – is foreclosed by the plain language of *Gerstein* itself, which directs that the focal point of an inherently transitory claim be this very uncertainty:

No. 06-CV-01405, 2008 WL 697428, at *10-11 (D. Colo. Mar. 13, 2008); *Kazarov v. Achim*, No. 02-C-5097, 2003 WL 22956006, at *3 (N.D. Ill. Dec. 12, 2003); *Jane B. v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 67-69 (S.D.N.Y. 1987); *Faheem-El v. Klincar*, 600 F.Supp. 1029, 1035 (N.D. Ill. 1985); *Arrango v. Ward*, 103 F.R.D. 638, 639-40 (S.D.N.Y. 1984); *Coleman v. Stanziani*, 570 F.Supp. 679, 682 & n.2 (E.D. Pa. 1983); *Green v. Johnson*, 513 F.Supp. 965, 974-75 (D. Mass. 1981); *Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F.Supp. 494, 501-02 (M.D. Ala. 1976); *Dillard v. Pitchess*, 399 F.Supp. 1225, 1226 (C.D. Cal. 1975); *Mudd v. Busse*, 68 F.R.D. 522, 532 (N.D. Ind. 1975), *on reconsideration on other grounds*, 437 F.Supp. 505 (N.D. Ind. 1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978).

> The length of pretrial custody cannot be ascertained *at the outset*, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. *It is by no means certain that any given individual, named as plaintiff*, would be in pretrial custody long enough for a district court to certify the class.

Gerstein, 420 U.S. at 111 n.11 (emphasis added). This holding can also be garnered from this Court's application of the *Gerstein* doctrine to the plaintiffs' claims in *Swisher*, 438 U.S. at 213 n.11 ("Here the rapidity of judicial review of exceptions to masters' proposals creates mootness questions with respect to named plaintiffs, and even perhaps with respect to a series of intervening plaintiffs appearing thereafter, 'before the district court can reasonably be expected to rule on a certification motion.'") (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975)).

In neither *Gerstein* nor *Swisher* did the apparent dearth of evidence concerning the length of a claim's viability present any roadblock to the invocation of the inherently transitory exception by this Court. To the contrary, the proper focal point is (a) on whether the duration that any individual's claim will remain extant "can[] be ascertained at the outset" of litigation and (b) on whether it is likely that the class will not be certified before any individual's claims are rendered moot. *Gerstein*, 420 U.S. at 111 n.11; *see also Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010).

Given that approximately half of the inmates of Tippecanoe County Jail do not remain in the jail for longer than three (3) months and that uncertainty naturally exists as to which inmates will remain incarcerated for lengthier periods of time, this case represents the paradigmatic instance in which the application of the *Gerstein* doctrine is appropriate.[2]

Moreover, the Sheriff's assertion that the Seventh Circuit "analyz[ed] a particular individual's claim instead of the [class's] claim generally," *see* Pet. 7-11, is belied by that court's decision itself. In determining that the claims in the present case were eligible for the benefit of the inherently transitory exception, the Seventh Circuit repeatedly referenced the nature of the class as a whole, and its decision was in no way limited by Mr. Olson's particular circumstances. *See Olson*, 594 F.3d at 582 ("First, based on the stipulated facts, it is uncertain that any potential plaintiff *in the class of inmates* would have a live claim long enough for a district court to certify a class.") (emphasis added); *id.* at 583 ("An individual

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[2] Tellingly, an empirical study conducted during the 1990s revealed that, in four (4) federal district courts, the median time for ruling on a class motion ranged from 2.8 months in one district to 8.5 months in another. Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 102 (1996). More than a quarter of decisions on class motions were issued after the passage of 7.6 months following their filing in the most efficient of the four (4) districts; in the least efficient, a quarter of decisions were still not rendered 15.8 months following the filing of the class motion. *Id.*

incarcerated in a county jail may be released for a number of reasons that he cannot anticipate."); *id.* at 584 ("[W]e find that the *claim* is of the kind that is unlikely to be able to be certified before it becomes moot.") (internal quotation omitted) (emphasis added).

The Sheriff thus ignores entirely the commonsense notion that the application of the inherently transitory exception to particular circumstances presents a fact-specific inquiry that was faithfully undertaken in this case. Indeed, his argument simultaneously encourages the resort to litigation without adequate factual or legal investigation and would make eminently more difficult the prosecution of any claim challenging conditions of confinement in the county jail setting. On the one hand, the short thirty-nine (39) day delay between the named plaintiff's exhaustion of the grievance system on November 24, 2008, and the filing of a complaint on January 2, 2009, can easily be explained by the need for the plaintiff to recruit counsel and the need for counsel to engage in proper investigation.[3] And on the other, to

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[3] The Seventh Circuit concluded that "the period of time between the first possible day [the plaintiff] could file and the day he actually filed was only fifty-two days." *Olson*, 594 F.3d at 593. This conclusion was erroneous, and takes into consideration the thirteen-day period within which the plaintiff's individual claim was live after his complaint was filed. It is undisputed that Mr. Olson's last grievance appeal was filed on November 7th, and that this grievance was not deemed denied pursuant to the grievance policy of the Tippecanoe County Jail until fifteen

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the extent that *Gerstein* demands an examination of the likelihood that the claims of any individual will remain extant "long enough for a district court to certify the class," 420 U.S. at 111 n.11, the presentation of a contested class motion to the district court in a form that is ripe for adjudication oftentimes requires significant briefing or time-consuming discovery addressed to the class issue that would be undertaken only beneath the specter of any named plaintiff's impending release.[4]

Of course, the two (2) "main elements" that the Seventh Circuit focused on "for the 'inherently transitory' exception to apply," *see Olson*, 594 F.3d at 582 – that it be uncertain that the claim of any individual will remain live long enough for a ruling on class certification, and that there exist a constant class of persons suffering the alleged deprivations –

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(15) days later, or on November 24th (November 22nd was a Saturday). The period of time between November 24th and the date on which the plaintiff's complaint was filed – January 2nd – is only thirty-nine (39) days.

[4] In the present case, for instance, given that the Sheriff denied the existence of any of the practices or policies challenged in the complaint, the plaintiff was required – over the Sheriff's opposition – to obtain leave of court to contact the unnamed members of the class, a process that resulted in the submission of numerous affidavits attesting to the existence of the challenged policies. *See Olson*, 594 F.3d at 584; *cf. Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 (1982) (holding that a plaintiff must establish the existence of a class of similarly situated persons rather than rely only on the allegations in his complaint).

are those that are explicit in *Gerstein* itself. The Sheriff's purported "expansion" of the *Gerstein* doctrine is thus not an expansion of that doctrine but simply an acknowledgment that the facts of any particular case may yield different results under this Court's established test. The Seventh Circuit faithfully applied this Court's precedents in determining that the plaintiff could reap the benefit of the inherently transitory exception to mootness, and the fact that the Sheriff is not satisfied with that court's proper application of *Gerstein* and its progeny does not yield an issue worthy of certiorari.[5]

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[5] Given that neither case concerned the inherently transitory exception to mootness, the Sheriff's reliance on *Weinstein v. Bradford*, 423 U.S. 147 (1975), and *Board of School Commissioners of City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975) (*per curiam*), Pet. 9, is both confusing and inappposite. In each of these cases, this Court concluded only that a class was never properly certified – and the class issue was not pressed on appeal – and thus the mooting of the named plaintiffs' claims rendered the cases as a whole moot. *Weinstein*, 423 U.S. at 147-49; *Jacobs*, 420 U.S. at 129-30. Moreover, the Sheriff's purported "[e]roding of the case or controversy requirement," notwithstanding this Court's repeated affirmation of *Gerstein*'s exception to the mootness doctrine, relies only on dissenting opinions in cases not concerning the exception at issue in this case: the right of a since-moot plaintiff to press the denial of class certification on appeal, *see U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 412-13 (1980) (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., dissenting); and the ability of a class action defendant to intentionally render a case moot by tendering to the named plaintiffs the maximum they could have recovered on their individual claims, *see Deposit*

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II. There is no conflict amongst the circuits regarding the application of the "inherently transitory" exception, and the Sheriff's attempt to create one reveals only the common-sense conclusion that the application of this Court's clear and unequivocal test will result in different outcomes when invoked in different factual settings.

The Sheriff's attempt to drum up a circuit split where none exists, *see* Pet. 12-19, necessarily fails. No court has questioned the clear command of *Gerstein* and its progeny, nor have the lower courts experienced any difficulty applying this Court's established test (a fact attested to additionally by the relative dearth of circuit court opinions addressing the inherently transitory exception). Indeed, the decisions relied upon by the Sheriff from the First, Fifth, Eighth, and Ninth Circuits stand only for the unsurprising proposition that the evaluation of the transitory nature of any claim must be resolved by resort to the facts of the case as presented to the court. This was acknowledged by the Seventh Circuit in the present case, which explicitly noted that its determination was "based on the stipulated facts." *Olson*, 594 F.3d at 582.

The First Circuit, for instance, determined that a putative class action in which the plaintiffs challenged

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Guar. Nat'l Bank v. Roper, 445 U.S. 326, 353 (1980) (Powell, J., joined by Stewart, J., dissenting). Pet. 9.

delays in the processing of petitions for permanent residence was ineligible for the benefit of the inherently transitory exception simply because there was no showing "that the generic types of claims that they seek to pursue are likely to evade review." *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001).[6] Indeed, the claims of the named plaintiffs themselves were live for more than twenty-two (22) *months* before they sought judicial redress – a far cry from the thirty-nine (39) *days* within which the present plaintiff could have brought suit – and the plaintiffs' allegations that their petitions were processed only to evade review "constitute[d] too frail a foundation to support th[is] conclusion." *Id.* Although the Sheriff attempts to find relevance in the First Circuit's requirement that a plaintiff "show that the claims generally could not be expected to endure long enough for a district to rule on a motion for class certification,"

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[6] Of the cases relied upon by the Sheriff to establish a circuit split, *Cruz* is the only one that post-dates the enactment of the Prison Litigation Reform Act of 1997. To the extent that the fact-specific manner in which the transitory nature of any claim is affected by the ability of an inmate-plaintiff to have brought suit earlier than he did, *see Olson*, 594 F.3d at 593 (scrutinizing "the period of time between the first possible day [the plaintiff] could file [his lawsuit] and the day he actually filed"), this analysis is clearly affected by the present inability of such a plaintiff to bring his action prior to the exhaustion of a jail's internal grievance system – a process that may take several weeks, a month, or more. *See* 42 U.S.C. § 1997e(a). In that manner, the Sheriff's repeated reference to the 139-day window within which an average inmate of the Tippecanoe County Jail might file suit is misleading.

Pet. 15, this is the precise requirement announced by the Seventh Circuit in this case and the precise requirement established by *Gerstein*. The fact that the plaintiffs in *Cruz* failed to meet their factual predicate does not in any way inhibit the application of the inherently transitory exception in a case where that predicate has been met.[7]

The Sheriff's reliance on the Ninth Circuit's decision in *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997), suffers from a similar fallacy. In that case, the named plaintiff's claims were rendered moot while his class motion was pending, and the district court thereafter denied the class motion as "premature" and subsequently dismissed the case as moot. *Id.* at 669. Noting first that the plaintiff could press the class issue on appeal notwithstanding the dismissal of the underlying complaint pursuant to this Court's decision in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980), the Ninth Circuit concluded only that

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[7] The Sheriff's reliance on the First Circuit's decision in *Cruz* in order to create a purported circuit split is inapposite for another reason. Throughout the present litigation, neither party has contested that for a plaintiff to benefit from the inherently transitory exception to mootness a named plaintiff must file his complaint *and* his class motion prior to the expiration of his individual claims. If this is not accomplished, the case is "dead on arrival, moot the day the complaint was filed." *Holmes v. Fisher*, 854 F.2d 229, 232 (7th Cir. 1988). However, in *Cruz* the individual claims of the named plaintiffs were rendered moot approximately ten (10) weeks before class certification was even sought. 252 F.3d at 532-33. As such, the plaintiffs were ineligible for the benefit of the *Gerstein* doctrine in the first place.

the district court was required to evaluate the propriety of applying the inherently transitory exception to mootness before dismissing the case altogether. The court's subsequent remand to the district court to cure the fact that "the record . . . is devoid of any evidence" concerning the transitory nature of the plaintiff's claims, 118 F.3d at 670 – that is, to establish the factual predicate that the Seventh Circuit found present in this case – is of course a far cry from the circuit split that the Sheriff insists is present.[8]

The Eighth Circuit case relied upon by the Sheriff does not stand, as the Sheriff insists, for the broad proposition that a case involving both pretrial detainees and convicted inmates does not qualify for the inherently transitory exception. Rather, the only flaw noted by that court was that the named plaintiffs had "failed to present evidence that the . . . proposed class claims are 'capable of repetition, yet evading review.'" *Inmates of Lincoln Intake &*

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[8] The Sheriff reads *Kirkland* as establishing the rule that "it [is] up to the district court, not the circuit court, to determine whether a claim [is] 'inherently transitory' within the meaning of *Gerstein*." Pet. 17. However, remanding a case to the district court for the development of a factual record and for the opportunity to render a decision on a previously passed-upon issue in the first instance – as the Ninth Circuit did – does not obviate the well-established principle that after a district court issues such a determination mootness questions predicated on undisputed facts are reviewed by appellate courts *de novo*. *Kirkland*, 118 F.3d at 669 ("Mootness is a question of law reviewed de novo."); *see also Olson*, 594 F.3d at 580 ("Whether a case is moot is a question of law which we review de novo.").

Detention Ctr. v. Boosalis, 705 F.2d 1021, 1024 (8th Cir. 1983); *see also id.* at 1024 n.2 ("There has been no *showing* in the case before us of a similar obstacle to class certification.") (emphasis added). Moreover, the Sheriff's bright-line distinction between "pretrial detainees" and "convicted inmates" is non-existent in the case at bar, where even those class-members who have been convicted of their crimes are simply awaiting transfer to another facility (and the concomitant mooting of their individual claims). *See Olson*, 594 F.3d at 583 (The plaintiff's "transfer by the Indiana Department of Correction . . . illustrates one such unpredictable occurrence that could unexpectedly moot a claim for a county jail inmate.").

In *Rocky v. King*, 900 F.2d 864 (5th Cir. 1990), the Fifth Circuit similarly evaluated the facts of the plaintiff's claim and refused to apply the inherently transitory exception because "[u]nlike the named plaintiffs in *Gerstein*, [the plaintiff] is challenging conditions of long-term, not short-term, confinement." *Id.* at 870. That is obviously not the case presently, and the Sheriff's insistence that a circuit split exists simply because the same test applied to independent factual backdrops produces different results is without merit. Indeed, the Fifth Circuit in *Rocky* explicitly distinguished the case before it – in which a *pro se* plaintiff challenged the conditions of long-term confinement – with a case challenging conditions of confinement in a county jail. *See id.* at 870 n.5 (citing *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980)). After all, "confinement in a jail is by nature temporary." *Hauck*,

627 F.2d at 716; *see also Bell v. Wolfish*, 441 U.S. 520, 526 & n.5 (1979) (describing "the temporary nature of confinement at [a county jail]," even when the jail served to house "pretrial detainees and sentenced prisoners alike").[9]

In *Gerstein* and its progeny, this Court has spoken with a clear voice. Over the past thirty-five (35) years, the lower courts have applied the resultant doctrine faithfully. The mere fact that courts in some cases found the inherently transitory exception to mootness applicable while courts in other cases have not bespeaks not a circuit split but the nature of litigation: differing facts viewed under the same legal lens will oftentimes yield different results. Certiorari is not warranted in this case.

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[9] The Sheriff's reliance on the Fourth Circuit's decision in *Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980), to establish a circuit split is even more far-fetched. In that case, the district court denied class certification and the issue was not pressed on appeal. Under *Geraghty*, this fact alone warranted the dismissal of the plaintiff's injunctive claim. 445 U.S. at 404 ("A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified.").

CONCLUSION

The petition should therefore be denied.

Respectfully submitted,

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